



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1444/11

In the matter between:

DANIEL MAFOKO

Applicant

and

ALCATEL LUCENT SOUTH AFRICA (PTY) LTD

First Respondent

LARVOL JEAN-PHILLIPE

Second Respondent

Heard: 12 July 2013

Delivered: 5 August 2015

Summary: Superannuation and Revival of Judgments

JUDGMENT

PONELIS, AJ

Introduction

[1] During April 2004 the second respondent dismissed the applicant, a senior support engineer, for operational requirements. Thereafter the applicant initiated a dismissal dispute under the applicable provisions of the Labour Relations Act¹ ('LRA'). Ultimately the matter proceeded to adjudication under this Court's case number JS512/04. In a written judgement handed down on

¹ 66 of 1995

18 May 2007 ('judgment'), Leeuw AJ held that the applicant's dismissal was both procedurally and substantially unfair and ordered the first respondent to pay the applicant twelve (12) months remuneration based on his rate of earnings at the time of his dismissal.

- [2] Pursuant to the judgement, the first respondent obtained a tax directive from South African Revenue Service (SARS), on the basis that the applicant's gross annual salary, at the time of his dismissal, amounted to R357 224.08. On 30 October 2008 the first respondent paid the applicant the said amount, less tax as directed by SARS.
- [3] The applicant contends that his entitlement under the judgement is in excess of the sum of R357 224.08 on the basis of which the first respondent obtained the tax directive.
- [4] By application launched during or about July 2011, under case number J1444/11 ('main application'), the applicant seeks the following relief, in addition to costs:
- (i) In the first instant, the applicant applies for revival of the judgement, as envisaged in Rule 66(1) of the Uniform Rules of Court. As ancillary to this relief, the applicant seeks: (a) an order that the correct amount to be paid as compensation by the first respondent is as set out in the judgement; (b) that the tax directive is invalid and/or an out of court variation of the judgement; (c) directing the first respondent to re-apply for a tax directive; and (d) ordering the respondents to comply with their obligations under the judgment. (Henceforth I shall refer to this part of the relief sought as 'Revival of Judgment and Ancillary Relief').
 - (ii) In the second instant, the applicant applies for a declaration that the first and second respondents are in breach of the judgment and that they be fined and/or imprisoned for contempt of Court. (Henceforth I shall refer to this part of the relief sought as 'Contempt of Court Application'). In conjunction to this relief, the applicant launched an application by notice of motion dated 30 December 2011, under case number J1444/11, whereby he seeks to change the citation of the first

respondent and to substitute the second respondent for one Michael Henry Meyer; pursuant to Rules 22(4) and 22(5). (I shall henceforth refer to this as 'Rule 22 application').

- [5] The respondents further apply for condonation of late delivery of their answering affidavit in the main application. Having read the documents filed of record and having listened to the submissions of both parties, I am persuaded that the respondents have shown good cause for their failure to deliver the said affidavit within the prescribed time limit. I accordingly condone late delivery of their answering affidavit.

Revival of Judgement and Ancillary Relief

- [6] The essence of the applicant's case is that the first respondent has failed to pay him his full entitlement under the judgment. It therefore appears that he seeks to execute the balance which he maintains remains outstanding. However, since the judgment was handed down on 18 May 2007, it became superannuated in May 2010; which means the applicant requires this Court's authority before he can proceed with execution.

- [7] This position is stipulated by Rule 66(1) of the Uniform Rules of Court, read with Section 163 of the LRA. Rule 66(1) provides:

“(1) After the expiration of three years from the day whereon a judgment has been pronounced, no writ of execution may be issued unless the debtor consents to the issue of the writ or unless a judgment is revived by court on notice to the debtor, but in such case no new proof of the debt shall be required. In the case of judgment for periodic payments, the three years shall run, in respect of any payment, from the due date thereof.”

- [8] It is trite law that a Court has the discretion to either abide to an application for revival or to refuse it. A Court will not revive an old judgment if, on the

facts before it, such revival would be futile, will only lead to useless litigation, and would not give the applicant any real remedy.²

- [9] It follows that, in order for the present application for revival of the judgment to succeed, it must be shown the judgment debt remains outstanding, either in whole or in part. Otherwise, revival of the judgment would be futile and academic.
- [10] Three respective paragraphs in the judgment are of particular importance in the present matter.
- [11] In the first instant, paragraph 19 of the judgment where Leeuw AJ quoted common cause facts as recorded in the pre-trial minute. This includes paragraph 2.18 of the pre-trial minute, which reads:

“2.18 The Respondent indicated at the second individualised consultation meeting that the retrenchment of the Applicant would result in cost saving for the Respondent in that the cost to company for two junior support engineers is R430 per annum and that the cost to company for one senior support engineer is R400 00,00 per annum.” (Emphasis added).

- [12] In the second instant, paragraph 46 of the judgment where Leeuw AJ held:

“[46] The main reason for the retrenchment of the Applicant was that the Respondent Company would save an amount of R389 517-60 which is the Applicant’s annual salary. The two junior support engineers namely Dannhauser and Madlope were each earning R188 817-12 and R266 878-80 per annum respectively, which is a total of R455 695-92. The Respondent gave the total amount of the two junior support engineers as R430 000-00 and that of the Applicant as R400 000-00 in the pre-trial minute.” (Emphasis added).

² *Cooper v The Van Rhyn Gold Mines Estates Limited and Mining Commissioner of Boksburg* 1908 TS 698

[13] In the third instant, paragraph 85; being the order contained at the end of the judgment; where the following is held:

“[85] I accordingly make the following order

(a) The dismissal by the Respondent of the Applicant is substantively and procedurally unfair.

(b) The Respondent is ordered to pay the Applicant twelve (12) months remuneration based on his rate of earnings at the time of his dismissal.”

(c) There is no order as to costs.” (Emphasis added).

[14] The applicant’s case is essentially founded on paragraph 2.18 of the pre-trial minute (paragraph 19 of the judgment) as well as paragraph 46 of the judgment, where the respective amounts of R400 000.00 and R389 517.60 are mentioned. On the basis of the applicant’s founding papers, heads of argument and submissions at the hearing of this matter, it is unclear which one of these amounts he relies on; i.e. whether he says that he was entitled to R400 000.000 or R389 517.60.

[15] Regardless, reliance on either of the aforesaid paragraphs of the judgment is misplaced in the present context. This is because Leeuw AJ was seized with an unfair dismissal dispute, and she was therefore not required to make a finding on the quantum of the applicant’s annual package. Accordingly, the aforesaid paragraphs in the judgment are not determinative findings in respect of the applicant’s annual income.

[16] For purposes of execution of the judgment, the applicant can only rely on paragraph 85; being the order (operational part),³ where Leeuw AJ ordered 12 months remuneration based on the applicant’s earning’s at the time of his dismissal, without giving a specific amount.

³ *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 716B-C

- [17] The respondents contend that this amounted to R357 224.08. In support of this the respondents give a clear breakdown of the said amount, which is corroborated by a copy of the applicant's pay-slip as attached to the answering affidavit. Significantly, the applicant did not challenge the veracity of the breakdown or the pay-slip in reply.
- [18] Accordingly, there is no basis for the applicant's reliance on either R400 000.00 or R389 517.60 as his annual remuneration package. On the evidence, it is clear that his annual remuneration package amounted to R357 224.08.
- [19] I therefore find that the first respondent has fulfilled its obligations in terms of the judgment, for which reason revival thereof would be futile. Likewise there is no basis to grant the relief ancillary to revival of the judgment.

Contempt of Court Application and Rule 22 Application

- [20] Since the applicant failed to show non-compliance with the judgment, there is no basis to give further consideration to the Contempt of Court application and the concomitant Rule 22 Application since it is clear that this relief can also not be sustained.

Costs

- [21] The applicant's main application and Rule 22 application came very close to what can be perceived as unnecessary litigation. I was similarly not impressed by the conduct of the applicant's legal representative on the day of the hearing; being woefully unprepared and repeatedly trying the patience of this Court.
- [22] Having said this, I do not deem a special or punitive cost order to be in the interest of justice. There is however no reason to deviate from the general proposition that costs should follow the result.

Order

[23] In the premises, I make the following order:

- (i) Late delivery of the respondents' answering affidavit is condoned.
- (ii) The applicant's applications under case number J1444/11 (main application and Rule 22 application) are dismissed.
- (iii) There applicant shall pay the respondents' costs in the aforesaid applications.

PONELIS, AJ

Acting Judge of the Labour Court

For the Applicant:

Mr. J.N Mohamed

Goldberg Attorneys

For the Respondents:

Mr. F Malan

Edward Nathan Sonnenbergs