



IN THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Not Reportable

CASE NO: JR 483/11

In the matter between

CULLINAN DIAMOND MINE (PTY) LTD

Applicant

and

J LE PIENAAR N.O

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

MAMOKOPI BOROKO

Third Respondent

Heard: 13 June 2017

Delivered: 4 July 2017

Summary: The defence of *lis pendens* cannot succeed when the third respondent has not proved pending litigation between the parties. When an order is, owing to an obvious error, inconsistent with the body of the judgment, it may be corrected in terms of section 165(b) of the Labour Relations Act 66 of 1995.

JUDGMENT

LALLIE J

- [1] This is an application for the variation of paragraph 15 of the judgment handed down by this Court on 14 January 2014, to have the order that 'the application for review is dismissed' corrected to read 'the arbitration award is reviewed and set aside'. It is opposed by the third respondent.
- [2] The facts of this case are not in dispute. The applicant brought an application to review and set aside an arbitration award of the first respondent. The application was opposed by the third respondent. The application was argued and after considering the papers and arguments on behalf of the applicant and the third respondent, I issued the judgment which is the subject of this application, in paragraph 15 of which I dismissed the review application. After the judgment was handed down the applicant filed an application for leave to appeal, mainly, on the grounds that I erred in dismissing the review application having found in the body of the judgment that the first respondent had reached an unreasonable decision. The third respondent opposed the application for leave to appeal. The application was granted. In the reasons for granting leave to appeal I made it clear that as a result of an obvious error, I granted an order which is in direct contrast with the body of the judgment. It also did not express my intention. After receiving the judgment on leave to appeal, the applicant moved the application at hand. In the founding affidavit

the applicant submitted that it would not pursue the appeal as the obvious error could be corrected by bringing this application in terms of provisions of section 165 (b) of the LRA¹.

- [3] In the opposing affidavit the third respondent raised the defence of *lis pendens* on the grounds that the application at hand is irregular in the face of the leave to appeal that is currently pending. The applicant elected to appeal the judgment and the appeal has not been dealt with. The third respondent expressed the view that the application for the variation of the judgment is *lis pendens* in the face of the appeal which had not been finalized. The applicant did not file a replying affidavit. It was argued on behalf of the applicant that there is no merit in the point *in limine* raised by the third respondent because there is no pending appeal as the applicant decided not to pursue it. The third respondent argued that her version should be preferred as the applicant elected not to file a replying affidavit and indicate whether the applicant was proceeding with the appeal or whether the appeal has been formally withdrawn.

- [4] The defence of *lis pendens* can be relied on in the following circumstances²:

‘*Lis alibi pendens* can only be raised if there is pending litigation between the same parties or their privies based on the same cause of action before the same court or another court with equal competence’.

As the point *in limine* was raised by the third respondent, even in the absence of a replying affidavit, the third respondent had to prove *lis pendens*. The third

¹ Act 66 of 1995

² *Civil Procedure In The Supreme Court* by DR Harms, SC

respondent failed to prove pending litigation between the parties. The applicant submitted that it was not pursuing the appeal. The third respondent may not rely on the applicant's failure to indicate whether it has withdrawn the appeal because no allegation was made to the effect that an appeal has been filed. After the application for leave to appeal was granted, the applicant acquired the right to appeal. It was up to the applicant to decide whether to exercise the right. As the applicant had not exercised the right to appeal, there was no pending appeal to be withdrawn. The third respondent did not discharge the onus of proving *lis pendens*.

- [5] The arguments raised on behalf of the applicant are consistent with the reason I gave for granting the application for leave to appeal that the order dismissing the review was an obvious error as in the body of the judgment I made an unequivocal finding that the award under review was unreasonable. I have considered the arguments raised on behalf of the third respondent and the authority on which they are based. I am not persuaded that they are correct. A proper reading of the judgment reveals that making the order dismissing the review application was an obvious error as the order is inconsistent with the body of the judgment and does not express my intention. The error is the kind of error envisaged in section 165 (b) of the LRA.

- [6] In the premises, the following order is made:

Order:

1. The point *in limine* is dismissed.

2. Paragraph 15 of the judgment under case number JR483/11 and dated 14 January 2014 providing that the application for review is dismissed is varied and corrected to read as follows:

2.1 The arbitration award is reviewed and set aside.

Z Lallie

Judge of the Labour Court of South Africa