



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE NO: JR1571/15

In the matter between:

MALUTI FET COLLEGE

Applicant

and

JJ KRUGER AND OTHERS

Respondent

Heard: 16 August 2017

Delivered: 16 August 2017

Edited: 09 March 2018

EX TEMPORE JUDGMENT

MOSHOANA J: This is an application to rescind an order made by this court on the 17th of May 2016 in terms of which this court set aside an arbitration award and ordered that the dispute be determined *de novo* by another commissioner.

It is common cause in these proceedings that at the time when the order was made, the other parties affected by the award was

not present, being JJ Kruger and others. However, when the applicants – that is JJ Kruger and others; in the course of this judgment it is easier to refer them as such – became aware of the order in September 2016 or thereabout, they then brought an application to have the order rescinded and principally raised the fact that they were not aware of the sitting of the court on the 16th of May 2016 when the order was made.

In opposing the application for rescission, the college (Maluti FET College) raised a number of points in *limine*. On the opposing
10 affidavit the points in *limine* were recorded as such:

“I have been advised that the following points apply to the applicant’s application:

5.1 The parties are not properly cited as applicant as referred to as respondent and vice versa.

5.2 The Education Labour Relations Council and Advocate Raynold Bracks, the author of the arbitration award under case number ELLC043-13/14 have not been joined as parties to the application.

20 5.3 It is not clear which members constitute the applicant in his application.

5.4 The applicant’s supporting affidavit does not comply with regulation 4(1) of the regulations promulgated in terms of the Justice of the Peace and Commissioners of Oath, Act 16 of

1963.”

I hasten to point out that Mr Choeu appearing for Maluti FET College indicated that the first point relating to the parties not properly cited is not persisted with. What he persisted with related to what I would summarise as the non-joinder, the *locus standi* and the defect in the founding affidavit relating to gender and also the place at which the affidavit was commissioned.

Mr Thateng appearing for JJ Kruger and Others indicated that these issues were argued before my brother Van Niekerk J and they
10 were decided upon and ought to not have been raised again. I do not agree, because the court order of the 15th of February 2017 clearly states that the rescission application is enrolled for hearing. In the rescission application there lay the points in *limine* which had been raised and the court need to consider them. Given the view I take at the end, it may not be necessary to deal with the points in any details, but I will return to them later in this judgment.

Regarding the merits of this application, it is common cause that notification of proceedings of this court are sent out of the office of the registrar. The registrar had sent out a notice of set-down to a
20 particular fax number. Now, a dispute arose during argument as to whether that fax number belongs to anyone.

However, if I were to accept that that fax number was at some stage provided by the party or one of the parties in earlier proceedings, the determining factor is whether the applicants or JJ Kruger and Others were aware of the hearing date and also whether if

the court that issued the order at the time was aware of the fact that they did not receive, as they now allege, the notice of set-down, would the court have proceeded to issue the order.

Mr Choeu conceded that as a matter of law, if that fact was brought to the attention of the presiding judge at the time, the presiding judge would not have proceeded to issue the order as he did. Now, the applicants before me in their founding papers at paragraphs 27 and 28 stated the following:

10 “The court order made by Honourable Justice Tlhotlhemaje was made in absence of the applicants and their legal representatives as they were not served with the notice of set-down.

28. The applicants are not in wilful default and they did not know the court date.”

In response to the allegations, the college stated the following:

“I admit that the court order was made in the applicants’ absence, but deny that they were not served with the notice of set-down. In relation to paragraph 28, the contents hereof are denied.”

20 Now, out of the papers that are before me, it is apparent and very clear to me that JJ Kruger and Others were not aware of the set-down notice on the day. And if this fact was brought to the attention of the presiding judge, the order would not have been issued. Accordingly, I believe that there is a basis for this court to rescind the order that was made to enable JJ Kruger and Others to appear and

vindicate whatever rights they have.

Before I conclude, I return to the points in *limine*. In relation to the joinder, it ought to be understood that the applicants or Maluti College itself in the review application cited the applicants, the Education Labour Relations as the first respondent and Advocate Raynold Bracks as the second respondent. Now, what is being sought to be rescinded is an order that was made whereat these parties were cited.

Now, Mr Thateng correctly pointed out that the fact that the
10 court would issue an order, rescinding the order that was made on the 17th of May 2016 would not affect the parties that are mentioned. In fact, the parties themselves have filed a notice to abide, as it appears on page 67 of the paginated papers, wherein the second respondent and the first respondent, being the Education Labour Relations Council and Advocate Raynold Bracks are saying that they will not oppose the application and they will abide by the decision of the court. Clearly they have taken themselves out of the matter completely. And accordingly, the point in relation to non-joinder is not upheld.

The issue about the Rule 21 notice and the issue of
20 membership and *locus standi* – Section 200 of the Labour Relations Act is very clear. A Union can act in its own capacity or in the interest and on behalf of its members. Now, once it is established, which may be an issue that can still be raised at the review application that they are members of the union, *cadit quaesto*. Accordingly, I do not uphold the second point.

The third point relates to the affidavit. All of those points are really technical points. And this court on a number of occasions has said that it is a court of equity and all these technicalities would not be upheld by the court, because the guiding principle is fairness. On those bases, I would not uphold this point as well. In conclusion, the order I make is the following:

ORDER

The order made by this court on the 17th of May 2016 is hereby
10 rescinded. I make no order as to costs.

MOSHOANA J
JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

Counsel for Applicant: Adv. Choeu

Counsel for Respondent: Mr Thateng

Date of Judgment: 2017-08-16



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MALUTI FET COLLEGE v JJ KRUGER AND OTHERS

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