

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 2548/2015

D 1154/2015

In the matter between:

SASBO-THE FINANCE UNION

Applicant

and

DUMA, CN

First Respondent

ENROLLED: 05 May 2020, in view of the measures implemented as a result of the Covid-19 outbreak this matter was decided on papers.

DELIVERED: This judgment was handed down electronically by circulation to the parties representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 25 May 2020.

Summary: interlocutory application- whether it is reasonable and justifiable to debar the respondent from pursuing his rescission application - payment of the security for costs in the labour court

JUDGMENT

MABASO, AJ

Introduction

- [1] This is an interlocutory application whereby the applicant seeks an order that the respondent should provide security for its costs in pursuing the rescission application that he has delivered against the order of this Court, whereby the

review application of the respondent previously delivered was dismissed due to the delay in its prosecution and costs thereof.

- [2] The question to be answered in this judgement is whether or not it will be reasonable and justifiable to debar the respondent from pursuing his rescission application until he pays the applicant's security for costs?

Background

- [3] In December 2016, the Applicant launched an application to dismiss the review application that had been lodged by the respondent the previous year. Its application was granted in February 2018 in the absence of the respondent. The former then proceeded to prepare the bill of costs, which was then taxed at the amount of R203 901.58.
- [4] The respondent became aware of the default judgement on 27 October 2018, and as a result proceeded to launch the rescission application, however he "filed" it on 19 November 2018 and the applicant contends that the rescission application was filed late. The applicant's attorneys thereafter dispatched a letter to the respondent advising him of their concern that the rescission application was out of time, therefore, encouraged him to bring a condonation application.
- [5] In summary, the applicant avers that the application is not properly submitted before court because the rescission application was only initiated once the taxed bill was served on the respondent and there are poor prospects of success. It further alleges that it will not be able to recover costs from the respondent incurred in preparation for the rescission which include, among other things, drafting of an answering affidavit and the preparations thereafter.
- [6] The respondent delivered an answering affidavit, out of time, and in turn, the applicant objects to same, and there is no condonation application that was delivered by the respondent thereafter. Under the circumstances, the

answering affidavit was disregarded. The applicant further states that the last known financial status of the applicant was that he was not the man of straw.

- [7] The procedure in launching this application is governed by Uniform Rule 47. A litigant may claim security for costs, for instance where a statute provides so, and /or the main application is reckless, vexatious, and is an abuse of the process of the Court.
- [8] This court will use its discretion to order provision for security for costs, if the applicant has successfully pursued its case that security for costs should be paid.
- [9] The general rule is that all citizens of the Republic of South Africa have a right to approach a court of law and cannot be compelled to provide security for costs. This is on par with section 34 of the Constitution of the Republic of South Africa¹ (the Constitution), which specifically provides that everyone has the right to have any dispute that can be resolved in a fair public hearing before a Court. However, this right is not open-ended as it can be limited in terms of section 36 of the Constitution. Meaning, a party who seeks security for costs has to show that it is reasonable and justifiable to do so. *In casu*, the applicant has failed to show reasons to believe that it will not recover costs from the respondent, should such costs be ordered against the latter, as in its papers confirm the last known fair financial status of the respondent.
- [10] If this Court is satisfied that the rescission is vexatious or amounts to abuse of the court processes; it may order security for costs but has to be guided *inter alia* by the provisions of section 162 of the Labour Relations Act² (LRA). The court in *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others*³, explained the term vexatious thus:

¹ Act 108 of 1996.

² No. 66 of 1995, as amended.

³ 1980 (4) SA 156 (W).

“In its legal sense vexatious means:

“frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant. Vexatious proceeding also not doubt proceedings which, although properly instituted, continued with the sole purpose of causing annoyance to the defendant, abuse connotes a mis-use, improper use, a use mala fide, a use for an ulterior motive”

- [11] The applicant, in its supporting affidavit, states that the respondent has no prospects of success, however, it did not advance reasons for that statement, and has not attached the answering affidavit to the rescission application which has been brought by the respondent. The case of Supreme Court of Appeal (SCA), in *Zietsman v Electronic Media Network Ltd and Another*⁴, applies in an application of this nature. A Court is not expected to resolve the dispute in the main application as the SCA held that it will depend on each and every case and also pointed out that the extent to which it is practicable to make an assessment of the parties, and prospects of success will depend on the nature of the dispute in each case.
- [12] I am of the view that if all the papers were properly placed before me, I would be in a better position to assess the lack of prospects as alleged by the applicant. Therefore, since they are not before me, I cannot rule in favour of the applicant.
- [13] On the point that the rescission application was delivered out of time, there are number of factors herein that have to be taken into account, considering that this Court has an inherent power to protect and regulate its own process, and to develop the common law taking into account the interests of justice,⁵ *inter alia* that whether the respondent is represented or not, that this Court is a court of equity⁶, that in the majority of matters before this Court parties are unrepresented. Sometimes, as a presiding officer, one comes across applications whereby they were delivered out of time. The question is, will it

⁴ [2011] ZASCA 169 (29 September 2011)

⁵ Section 173 of the Constitution

⁶ Section 151 (1) of the LRA

be reasonable and justifiable in an open and democratic society wherein such applications security for costs is ordered.

[14] My view is thus based on the facts of this matter. It cannot be in the interest of justice to make an order that the respondent pay security for costs for a reason that the rescission application was delivered late. Making such an order means a party would not be in a position to pursue their case until the security for costs is paid, because, if at a later stage a condonation application is delivered they will still be debarred from pursuing the case until money is paid. Meaning, the majority of the citizens will not have access to the Labour Court.⁷

[15] The Court that will be dealing with the rescission application, should it be set down without a condonation application being delivered and /or delivered but has no merits, will be in a position to make an appropriate order being guided by the provisions of section 162 (1) read with (2) (b) (i) or (ii) of the LRA.

[16] In respect of costs, as this Court has not taken into account the answering affidavit since it was filed out of time, I regard the matter as unopposed. Therefore, no costs order should follow.

[17] Therefore the following order is made:

Order:

1. The application for security for costs is hereby dismissed, with no costs order.

S Mabaso

Acting Judge of the Labour Court of South Africa

⁷ Section 34 of the Constitution.

Appearances:

For the Applicants: In chambers

Instructed by: BJ Erasmus Pieterse Attorneys

For the Respondent: In person

Instructed by:

LABOUR COURT