

SOUTH AFRICA / JUDGMENT

Dawson v NUPSAW (J2292/05)

[2007] ZALC 165 (1 January 2007)

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COURT

Labour Court

BEFORE

Deon Nel

CASE / FILE NUMBER

J2292/05

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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: J2292/05

In the matter between

MR STEPHEN DAWSON Applicant

and

NUPSAW Respondent

J U D G M E N T

NEL, AJ:

The matter before me is an application to rescind an order granted by Francis J on 26 January 2006.

Very briefly, what preceded that order was a situation where the applicant for rescission, Mr Stephen Dawson, had been awarded a considerable amount in three components by this court. The first component of the order was the payment to the applicant of R304 204.66. The second part of the order granted by Kruger J was that the applicant for rescission was to be paid the amount of R66 964.00 by the respondent and thirdly, an amount of R53 434.00 plus interest on the above amounts at 15 percent per annum from the date of judgment. What then happened after this order was granted is that the respondent sought a tax directive from the South African Revenue Services. That directive was to the effect that the Revenue Services were specifically

advised in the documents, which the court finds in the papers before it, that the three amounts, which I have mentioned a moment ago, were based on a court order. In fact, looking at the tax directive, it said, "Court order J5832/02" and then these three amounts were specified. Then fourthly, in terms of the fourth component, namely the 15 percent interest, it stated what that amount would be. It gave the gross amount payable as R452 024.17.

The papers before the court also disclosed that, subsequent to the respondent party having approached the South African Revenue Service with the request for a tax directive, it obtained such directive indicating that the respondent had to deduct an amount of R180 809.60. Having done the sum, it left a total amount of R271 214.57, payable to the applicant, which was duly paid over to the applicant for rescission.

What then followed was that the applicant actually proceeded to obtain a writ of execution and also went so far as to having a bank account of the respondent before me attached.

This all led to the matter eventually coming before this court, after it had been postponed on 25 November 2005 to 26 January 2006.

On 25 November 2005, the applicant for rescission was still represented by attorneys but shortly before 26 January 2006,

in fact on 12 January 2006, the applicant for rescission as well the attorneys of record withdrew as such.

That basically is a brief summary of what had eventuated, save to conclude the summary by stating that on 26 January 2006,

the judgment of Francis J was granted by default.

Very briefly, the facts deposed to by the applicant for rescission are in material respects disputed by the respondent. In this respect there are material contradictions contained in an affidavit filed by the applicant and that of the attorney of record on behalf of the respondent party herein. That being so, the court has to approach the matter by having regard to the facts or allegations made by the respondent together with those of the applicant not in dispute.

That being the situation, in the first enquiry, namely to determine whether the applicant was in wilful default, the court is driven to the conclusion that it must find that the applicant has not made out a case that he was not in wilful default.

Looking at the prejudice and the prospects of success, it is further the court's view that what is patently clear is that as a matter of fact and of course, as a matter of law, until such time as this court may rescind the order of Francis J, it is clearly so that the applicant for rescission has in effect received the full benefit of the order granted. It may be so that in the fullness of time, if he has not done so at this point in time, the applicant may persuade the South African Revenue Services that the whole, or part of the amount, may be repayable or stand as a credit to the applicant. This is the amount, which SARS had directed the respondent, who was the erstwhile employer of the applicant, to pay over to it.

Under all the circumstances, the court is not persuaded that the applicant has made out a case for rescission. Accordingly the

application is dismissed.

As far as costs are concerned, the respondent seeks costs on a punitive scale. This is a matter where the respondent has clearly

parted with the exact amount of money, which it was ordered to part with, in favour of the applicant. As far as the court could see, there was nothing untoward in respect of the respondent's conduct by having approached the Revenue Services for a tax

directive. In addition, the matter having been fully argued in terms of the law before Francis J, he was persuaded that there had been compliance and so ordered, albeit in the absence of the applicant for rescission. To the extent that this court has considered the merits of that matter, it certainly finds itself in concurrence with the ruling by Francis J.

Under all the circumstances, the only point which perhaps merits consideration is the fact, as was argued before me by Mr van der Merwe on behalf of the applicant, that the applicant also has had a punitive cost order granted against him in the matter on 26 January 2006. That in and by itself, if I understood Mr van der Merwe's argument, constituted sufficient grounds or reason why there should be a rescission because the applicant for rescission has deposed on oath to the proposition that he did not know about the matter being heard on 26 January 2006, and had he known, he would have opposed it and he would have participated in the proceedings. I am of the view that even if he had participated, it would not have made a difference. The fact of the matter is that is not what I should consider to determine whether this is a matter where punitive costs should be awarded against the applicant.

I do believe that this is a matter where the applicant should have accepted the outcome. Accordingly, in my view, there are no good or sound reasons to have persisted with the rescission application herein. The applicant could and in my view have directed his energies elsewhere, particularly with reference to the South African Revenue Services. Under all these circumstances the court believes that this is a matter where it should show its displeasure with the applicant's conduct by granting a punitive cost order. Accordingly the result is that the application is dismissed. The applicant is ordered to pay the respondent's costs on the scale as between attorney and client.

DEON NEL

ACTING JUDGE OF THE LABOUR COURT.

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Prepared on 13 October 2026 · Esheria