

SOUTH AFRICA / JUDGMENT

Foley v Transvaal Abrasives CC (J2003/02) [2015] ZALCJHB 259 (14 August 2015)

[2015] ZALCJHB 259**COURT**

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

J2003/02

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J2003/02

PATRICK JAMES FOLEY

Applicant

and

TRANSVAAL ABRASIVES CC

Respondent

Delivered: 14 August 2015

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The applicant seeks to have a default award issued under case number GA13222-01 by a CCMA Commissioner on 12 March 2002 be made an order of Court. The Respondent opposes the application and seeks that it be dismissed on account of the inordinate delay in enforcing the award. Aligned to the application to have the award made an order of court is a further application brought by the applicant in terms of Rule 11 of the Rules of this Court.
- [2] This application was heard on 19 October 2014 and judgment was reserved. On 21 January 2015, the applicant filed a notice of

application for leave to file a further affidavit. The respondent opposed this application.

Background:

[3] The applicant was dismissed by the respondent on 25 June 2001. He had referred an unfair dismissal dispute to the CCMA. The matter was heard in default and he was awarded compensation in the amount of R74 568.00 in terms of an award issued on 12 March

2002. It is this award which he seeks to make an order of court.

[4] The respondent had not complied with the award. Its then attorneys of record, PJB Van der Grijp had instead filed an application in terms of section 165 of the LRA for rescission of the award in this Court in May 2002. Clearly this was not a proper cause of action, and the applicant in his answering affidavit correctly raised this point, and further pointed out to the respondent that a rescission application ought to have been brought before the CCMA in terms of section 144 of the Labour Relations Act. In opposing the application for rescission at the time, the applicant was assisted by Dirk Coetsee Attorneys. In these proceedings, it was conceded on behalf of the respondent that indeed the said application was not the proper cause of action.

[5] On 10 September 2002, the applicant filed and served an application to have the arbitration award made an order of court. This

application was not immediately opposed. In May 2010 LJ De Jager Attorneys were appointed as the applicant's attorneys of

record. On 11 June 2010, some 8 years later, the applicant filed a Rule 11 application to have the rescission application dismissed.

[6] On 23 February 2011, a notice of set-down was sent to LJ De Jager attorneys and to the respondent. The matter was set down for 16 March

2011. LJ De Jager attorneys withdrew as the applicant's attorneys of record on 16 March 2011, in terms of a Notice dated 1 February 2011. On 16 March 2011 the matter was struck off the roll on account of non-appearance by both parties. In June 2012 the applicant filed an affidavit explaining the circumstances that led to his non-appearance on 16 March 2011. On 12 September 2012 the parties were then directed by the Court to file Heads of Argument in respect of the applicant's Rule 11 application.

[7] In November 2013, the respondent which was now represented by its current attorneys of record, Fluxmans Inc filed an answering

affidavit to the application to have the award made an order of court. Central to the submissions made in the answering affidavit was that the applicant was not entitled to relief in the light of the award having prescribed.

- [8] During the hearing of this matter however, it was indicated on behalf of the respondent that the preliminary point in respect of the issue of prescription was abandoned, and that the sole defence to the application was that it ought to be dismissed on account of lack of timeous prosecution.

Evaluation:

- [9] I am of the view that nothing prevents a party from approaching the court to seek leave to file further documents even if after a matter had been heard but before judgement is delivered as in this case. The issue however is whether such leave should be granted.
- [10] It was only at the hearing of the application that Adv Cook on behalf of the respondent abandoned the argument surrounding prescription. When Adv Ford on behalf of the applicant submitted that only the issue of prescription was raised in the respondent's answering affidavit, and that the respondent could not raise new matters in heads of argument, Adv Cook's response was that the respondent was entitled to raise the issue of inordinate delay even in its heads of argument.
- [11] A submission to the effect that a matter should be dismissed on account of inordinate delays in prosecuting it is substantial in nature. In the face of an application to have an award made an order of court, and where this application is opposed on account of the failure to prosecute such an application timeously, it is my view that the provisions of Rule 11 of the Rules of this Court should have been invoked, rather than merely raising such a matter in the course of written arguments. It is trite that a case cannot be made out in written heads of arguments, and the question raised by Adv Cook is not merely a procedural one in that if upheld, it has the consequences of disposing of the matter entirely.
- [12] Rule 11 of the Rules of this Court provides that;
- "Interlocutory applications and procedures not specifically provided for in other rules*
- (1) The following applications must be brought on notice, supported by affidavit:
- (a) Interlocutory applications;
- (b) other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in the rules; and
- (c) any other applications for directions that may be sought from the court.
- (2) The requirement in subrule (1) that affidavits must be filed does not apply to applications that deal only with procedural aspects.
- (3) If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances

(4) In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.”

[13] The reason for seeking to file a further affidavit according to the applicant is to set out a chronological account of attempts made and actions undertaken by him in the prosecution of his claim. The respondent has only filed a notice to oppose the application without any answering affidavit. Since a substantial application in terms of Rule 11 would ordinarily have been filed where the respondent sought to have the matter dismissed, and since such an application was not made, it is my view that having had regard to the provisions of Rules 11 (3) and 11 (4), leave to file a further affidavit should be granted.

[14] My conclusions are based on the protracted history of this matter, and in particular, regard is also had to the ill-considered

rescission application by the respondent, the failure to timeously oppose the application to make the award an order of Court, the failure to oppose the applicant’s Rule 11 application, and most importantly, the belated raising of the point in limine the heads of argument in respect of the application to make the award an order of court. Considerations of equity clearly dictate that the applicant should be afforded an opportunity to respond to substantial arguments and legal points raised by the respondent in its written heads of argument. Accordingly, the following order is made;

Order:

- i. The applicant is granted leave to file a further affidavit.
- ii. The applicant’s further affidavit is to be filed within 14 days of the handing down of this order.
- iii. The respondent is entitled to file a response to the further affidavit within 14 days from the date that it is served on it.
- iv. The Registrar of the court is directed to set the matter down once paragraphs (ii) and (iii) above have been complied with.
- v. The costs of this application and those in respect of the proceedings of 19 October 2014 are reserved.

Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv. B Ford

Instructed by:

Rabia Sayed Attorneys

For the First Respondent: Adv. A L Cook

Instructed by:

Fluxmans Inc

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