

SOUTH AFRICA / JUDGMENT

Groom v Daimler Fleet Management (Pty) Ltd (JA39/20) [2020] ZALAC 66 (4 August 2020) [2020] ZALAC 66

COURT

Labour Appeal Court

BEFORE

Davis JA, Coppin JA, Savage AJA

CASE / FILE NUMBER

JA39/20

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IN THE LABOUR APPEAL

COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA39/20

In the

matter between:

PHILLIP HENRY
GROOM Appellant
and
DAIMLER FLEET
MANAGEMENT (PTY)
LTD Respondent
Heard: 27
May 2021
Delivered: Deemed
to be 4 August 2020.
Coram: Davis
JA, Coppin JA et Savage AJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the order of the Labour Court (Lagrange J) granting a LC[1] Rule 11 application of the respondent, and specifically, (a) declaring the appellant's unfair dismissal claim against the respondent to be deemed abandoned, as contemplated in section 359(2)(a) of the 1973 Companies Act[2] for failing to give the requisite notice, and dismissing it; and (b) striking from the roll the appellant's conditional counter-application in terms of section 359(2)(b) of that Act to condone his late notice or failure to give a notice, and

(c) ordering the appellant to pay the costs of the respondent's

application and its opposition to the appellant's conditional counter-application. Leave to appeal to this Court was granted on petition.

[2] LC Rule 11 deals with interlocutory applications and other procedures not specifically provided for in the rules. Briefly, and to give context to the order appealed against – after the appellant had instituted an unfair dismissal claim against the respondent in the Labour Court, the respondent went into voluntary liquidation. Section 359(1) and (2) of the 1973 Companies Act, which are still valid and applicable to the liquidation of companies in terms of the new Companies Act of 2008[3], reads:

“359 Legal proceedings suspended and attachments avoid

- (1) When the court has made an order for the winding up of a company or a special resolution for the voluntary winding up of the company has been registered in terms of section 200 –
 - (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and
 - (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding up shall be void.
- (2) (a) Every person who, having instituted legal proceedings against the company which were suspended by a winding up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.
 - (b) if notice is not so given, the proceedings shall be considered to be abandoned unless the court otherwise directs.”

- [3] Issues that arise in this case which will be dealt with in the judgment are, whether (a) the respondent made out the case at the appellant's unfair dismissal claim that it had been abandoned as contemplated in section 359; and assuming so, whether the appellant's claim had indeed been abandoned as contemplated that section. As part of both

issues

the question of the Labour Court's jurisdiction to determine the issue of abandonment will be dealt with.

Essential background facts

- [4] The appellant was employed by the respondent on 29 June 1981. On 8 December 2015, following lengthy negotiations, the respondent terminated his employment, allegedly, due to operational requirements.
- [5] Aggrieved by this, the appellant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). When conciliation failed, the appellant instituted a claim for unfair dismissal in the Labour Court. He filed a statement of claim on 1 April 2016, and the respondent delivered its response to the claim on 21 April 2016.
- [6] In his statement of claim, the appellant alleges, inter alia, that his dismissal by the respondent was both procedurally and substantively unfair; that it was not for operational reasons at all and had resulted, inter alia, in a reduction of his lump sum pension fund entitlement in the amount of about R 2 million, as well as in the forfeiture of his entire severance package, allegedly because he refused alternative employment. Needless to say, the respondent disputed all these allegations and sought a dismissal of the appellant's claim.
- [7] Before November 2016, rumours were circulating that the respondent was considering liquidation. A notice addressed to its customers had been posted on the respondent's website to the effect that it would be ceasing its business activities by 1 November 2016.
- [8] At the time attorneys acting for the appellant had sought confirmation of the truth of the rumours and also applied for an urgent allocation of a trial date. On 4 November 2016, the respondent replied to the appellant's attorneys to the effect that it was not obliged to inform the appellant of its intentions regarding liquidation, and that the appellant would have an opportunity to exercise his rights if and when the respondent was liquidated.
- [9] Unbeknown to the appellant, in December 2016, the respondent passed a special resolution for its voluntary liquidation. Unaware of that fact, the appellant's attorney addressed two further emails to the respondent during, respectively, December 2016 and January 2017, enquiring whether the respondent was to be liquidated. The appellant only received notification of the respondent's voluntary liquidation in July 2016.

[10] The liquidator, Mr Barnard, was (allegedly) appointed on about 21 February 2017. Ignorant of this fact, the appellant of his own accord continued to try and establish whether the respondent had been liquidated, including searching on its website and the Government Gazette.

[11] Notice of the respondent's liquidation and Mr Barnard's appointment as the liquidator was only published in the Government Gazette of 10 July 2017, and it is only then that the appellant acquired actual knowledge of those

facts.

[12] The appellant engaged new attorneys to represent him and they promptly contacted the respondent on 12 July 2017 to enquire about the liquidation and Mr Barnard's appointment. Further correspondence between them ensued.

[13] On 25 August 2017, about six months after the liquidator's appointment, the appellant, through his attorneys, gave the liquidator a notice contemplated in section 359(2)(a) to the effect that he would be continuing with the unfair dismissal claim that he had instituted in the Labour Court before the respondent's voluntary liquidation.

[14] On 6 October 2017 attorneys representing the liquidator informed the appellant (i.e. through his attorneys) that the section was not applicable. On 12 October 2017, the appellant requested that the matter (i.e. his unfair dismissal claim), which was set down to proceed to trial in the Labour Court on 23 October 2017, be removed from the trial roll and, instead, be set down for 27 October 2017.

[15] On 6 December 2017, the respondent's attorneys by email addressed to the appellant's attorneys enquired with reference to the matter that had been removed from the trial roll to "[k]indly advise whether your client intends to pursue the referral, and if so, the date on which the referral will be heard." The appellant's attorneys confirmed that the matter was to proceed and was to be enrolled for trial on 4 March 2019.

[16] In May 2018, the respondent set the matter down for trial on 4 March

2019. In a letter dated 23 May 2018 the respondent's attorneys acknowledged the notification of the set down by the registrar of the Labour Court and requested the registrar to forward the set down to them.

[17] On 5 July 2018, the respondent's attorneys informed the appellant's attorneys by letter, inter alia, that the appellant had failed to comply with section 359(2)(a), and in particular, had failed to give the liquidator the notice contemplated in that section and that the appellant's claim was "deemed abandoned" as contemplated in that section.

- [18] The appellant addressed various items of correspondence in response to clarify the position, in particular, since the letter of 5 July was a volte face in respect of the position the respondent, or more particularly, the attitude Mr Barnard took earlier when he advised that the section did not apply. To these there was no reply.
- [19] The appellant proceeded in December 2018 to institute another action against the respondent, and others, including Mr Barnard, for breach of his employment agreement. Amongst other things, the appellant contemplated consolidating the actions and joining the respondents in the second action as respondents in the first matter, but, ultimately, did not act upon some of those ideas.
- [20] On 28 February 2019, the Friday before the trial of the unfair dismissal matter, the respondent caused a practice note to be filed in which it, for the first time, raised as a preliminary point to be decided that the appellant's claim was deemed to be abandoned as contemplated in section 359(2)(a).
- [21] The appellant's attorneys took issue with those contentions and argued that the appellant had indeed complied with the section, but that, in any event, the Labour Court would be requested to declare that the appellant's claim had not been abandoned.
- [22] At the trial hearing on 4 March 2019, when the respondent raised the issue of the abandonment of the claim as a preliminary point, it was directed to deliver a Rule 11 application dealing with the point.
- [23] Following an exchange of affidavits, which included a conditional counter-application brought by the appellant, effectively, seeking an order that his claim had not been abandoned, the rule 11 application was argued. In its replying affidavit the respondent, inter alia, asked for the dismissal of the appellant's claim and for the striking –off of the counter-application, on the ground, inter alia, that the Labour Court did not have jurisdiction to consider it (presumably in light of section 12 of the 1973 Companies Act).
- [1] Labour Court.
- [2] Companies Act 61 of 1973.
- [3] See item 9 of Schedule 5 of the Companies Act 71 of 2008.
- [4] (2015) 36 ILJ 2611 (LC).
- 5 The Labour Relations Act 66 of 1995.
- [6] (3/2016)
- [2017] SZSC 3 (05 May 2017).
- 7 See para 7 of the judgment.
- [8] (2019) 40 ILJ 798 (LAC) paras 18-20.

- [9] See, inter alia, *Gilbert Hamer & Co Ltd v Icedrome Promotions (Pty) Ltd* 1962 (3) SA 372 (D) at 373; *Van der Harst v Wells* NO 1964 (4) SA 362 (W) at 363; *Michaels v Wells* NO 1967 (1) SA 46 © at 53; *Barlows Tractor Co (Pty) Ltd v Townsend* [1996] ZASCA 3; 1996
- (2) SA 869 (A) at 884F-G; PM Meskin et al *Henochsberg's Commentary on the Companies Act 61 of 1973* (Lexis Nexis; 5ed) Commentary on section 359.
- [10] See, inter alia, *Ronbel 108 (Pty) Ltd v Sublime Investments (Pty) Ltd (in Liquidation)* 2010 (2) SA 517 (SCA) at 343; *Umbogintwini Land and Investment Co (Pty) Ltd v Barclays National Bank Ltd* 1987 (4) SA 894 (A) at 910; *Henochsberg's Commentary on section 359 of the Companies Act 61 of 1973* (above).
- [11] See *Ronbel* (above) at 342.
- [12] See 18 LAWSA (3 ed) para 236.
- [13] *Ibid.*
- [14] See 11 LAWSA (2ed) para 527 and the cases cited there.
- [15] See: *NCS Plastics (Pty) Ltd v Erasmus* 1973 (1) SA 275 (O) at 278A; and Joubert et al (eds) LAWSA (First Re-Issue) Vol 11 para 451 – Jurisdiction.
- [16] See, inter alia, *Permanent Secretary Department of Welfare, Eastern Cape v Ngxuza* (493/2000) [2001] ZACSA 85 (31 August 2001); 2001 (4) SA 1184 SCA- at 1201D-F and *Roberts Construction Co. Ltd v Wilcox Bros. (Pty) Ltd* 1962
- (4) SA 326 (A).
- [17] Section 39(2) of the Constitution of the Republic of South Africa, 1996.
- [18] See, inter alia, *Hart v Pinetown Drive-Inn Cinema Pty Ltd* 1972 (1) SA 464 (D) at 469C-E.

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