

SOUTH AFRICA / JUDGMENT

Motor Industry Bargaining Council v Suliman (JS2561/10, J29/14, J304/14) [2015] ZALCJHB 165; (2015) 36 ILJ 2644 (LC) (29 May 2015) [2015] ZALCJHB 165

COURT

Labour Court Johannesburg

BEFORE

O Mooki

CASE / FILE NUMBER

JS2561/10, J29/14, J304/14

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case No: JS2561/10

Case No: J29/14

Case No: J304/14

DATE: 29 MAY 2015

Reportable

In the matter between:

MOTOR INDUSTRY BARGAINING COUNCIL.....Applicant

And

MOHAMED SULIMAN.....Respondent

Heard: In Chambers

Delivered: 29 May 2015

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

MOOKI AJ

[1] The applicant seeks leave to appeal the judgments of the court in which the court dismissed the applications in the following cases: MIBC v Pastor Rodrigues Cumaio (Case No J29/14) (“Cumaio”) and MIBC v Delen Johanna Grogor (Case No J304/14) (“Grogor”).

- [2] The applicant raises three grounds as the bases for its application. The grounds apply to all three applications, namely:
- 2.1 The court has jurisdiction, in terms of section 26 (5) of the Close Corporations, Act 69 of 1984 (“Close Corporations Act”) to declare respondents personally liable for the debts of a close corporation;
- 2.2 The court erred in deciding that the applicant should have approached the court by way of action proceedings;
- 2.3 The court erred in refusing to accept the “windeed searches’ as prima facie proof that the close corporations were deregistered on the dates indicated in the searches.
- [3] The applicant relies on the decisions in *Dennis Meyer v Horizon Carpet Manufacturers CC and 2 Others* (Case C 352/07) and *Madeleine Esterhuizen v Million-Air Services CC and 3 Others* (Case J 1870/05) in support of the proposition that the Labour Court has jurisdiction to declare a member personally liable in terms of section 64 of the Close Corporations Act. It is submitted on behalf of the applicant that the court ought to have followed the two decisions.
- [4] The two authorities do not support the case advanced on behalf of the applicant. The court in *Esterhuizen* did not, contrary to the position advanced on behalf of the applicant, “decide” that “... the Labour Court has jurisdiction to declare a member personally liable in terms of section 64 of the Act, where the Labour Court issued a writ in respect of the award.” On the contrary, the court determined that section 64 was not applicable in relation to the issues to be decided by the court.
- [5] The court in *Esterhuizen* identified the “crux” of the matter before that court as whether the corporate veil should be pierced as regards the third respondent and the enforcement of an arbitration award against the first respondent and in favour of the applicant in that case. The court determined, in part, that “the award against the first respondent was in fact against third respondent. It should therefore be effective against the third respondent in any guise.” Part of the order made by the court was that “The third respondent was a real employer of the applicant and is liable, jointly and severally with the second respondent, to pay the amount awarded to the applicant in the CCMA award under case number GA 17181/02”.
- [6] It is manifest that the court in *Esterhuizen* did not address the issues raised by the applicant in the current applications. It is in this regard that that decision is not authority for the proposition been advanced on behalf of the applicant. The same applies to the decision by the court in *Meyer*.
- [7] The issue before the court in *Meyer* was whether the Labour Court has jurisdiction pronounce on a claim in respect of sections 64 and 65 of the Close Corporations Act. The applicant sought relief on the grounds that “... if a Close Corporation is deregistered while having outstanding liabilities, the person who was a member of such corporation as a time of deregistration, shall be liable for such liabilities.” In its grounds for leave to appeal, the

applicant points out that its application was for the court “to declare the respondent personally liable for the debts of the close corporations in terms of section 26 (5) of the Close Corporations Act, Act 69 of 1984...”. It is manifest that the court in Meyer did not consider the same subject matter as the applications before this court.

- [8] The court did not, in dismissing the applications, do so on the basis that the applicant should have approached the court on action proceedings as opposed to motion proceedings. I find that the second ground lacks merit in that the applicant misconceived the basis upon which the court dismissed its application.
- [9] The relief sought by the applicant, if the court were to grant that relief, requires the court to be satisfied of the fact of deregistration. The applicant contends that the court should have accepted that the “windeed” reports annexed to the applications were prima facie proof of the fact of the deregistration of the close corporations on the dates mentioned in those documents. The applicant did not advance any authority to support its contentions when the court considered the applications on

the merits. The applicant equally does not cite any authority in these applications.

- [10] The substance of the issue raised in the application appears somewhat novel. In particular, the question of whether or not the Labour Court can sanction a “civil penalty” in the manner set out in the decision by the Supreme Court of appeal in *Mouton v Boland Bank* 2001 (3) SA 877 (SCA) does not appear to have been considered by the Labour Court or by the Labour Court of Appeal. A determination of this question is inextricably linked with the jurisdiction of the Labour Court itself on this subject.
- [11] The question ought to enjoy the attention of the Labour Court of Appeal. I therefore grant leave to appeal, but only in respect of the following issue: whether the Labour Court is competent to impose a civil penalty by obliging a person who was a member of a close corporation at the time of the deregistration of such a close corporation liable for liabilities of a close corporation as at the time of the deregistration of such a close corporation.
- [12] There is an aspect that bears mentioning. This concerns the proposition advanced on behalf of the applicant that the court in Meyer “decided” that the Labour Court has jurisdiction to declare a member personally liable in terms of section 64 of the Close Corporations Act. The court in Meyer did not make such a decision. The ultimate issue determined by the court was whether or not to grant an amendment. The court granted the amendment. Equally, the Court in Esterhuizen held that section 64 was not applicable to the issue been determined by the court.
- [13] Steenkamp J, in Meyer, cautioned against attempts to advance a case on account of selective quotations from a judgement. It is of greater concern where a proposition is advanced on the basis that the court “decided” a particular issue when in fact the court did nothing of the kind. Practitioners have a duty, when advancing propositions on behalf of their client, to be faithful to whatever authority that they seek to invoke. It doesn’t serve the interests of justice

to suggest that a court decided an issue when a cursory reading of the particular judgement demonstrates the contrary. It is almost as if a practitioner, in penning such a proposition, did not expect the court to independently consider the particular authority. The court should not have to second-guess propositions advanced by practitioners; who are, after all, officers of the court.

[14] I make the following order:

- (i) Leave to appeal is granted, but only in respect of the following issue: whether the Labour Court is competent to impose a civil penalty by obliging a person who was a member of a close corporation at the time of the deregistration of such a close corporation liable for liabilities of a close corporation as at the time of the deregistration of such a close corporation.

O Mooki

Judge of the Labour Court (Acting)

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Prepared on 14 October 2026 · Esheria