

SOUTH AFRICA / JUDGMENT

Qubekela Projects CC v Mokoena

(J37/15) [2016] ZALCJHB 236 (8 July 2016)

[2016] ZALCJHB 236

COURT

Labour Court Johannesburg

BEFORE

Jackson

CASE / FILE NUMBER

J37/15

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J37/15

QUBEKELA PROJECTS CC Applicant and MPHAMO MOKOENA Respondent

Heard: 14 December 2015

Delivered: 8 July 2016

Summary: Application in terms of Section 165 of the Labour Relations Act for rescission of an order of court granted by Judge in chambers in terms of which an arbitration award issued by a commissioner of the CCMA was made an order of Court in terms of Section 158(1)(c) of the Labour Relations Act. Judge unaware of Applicant's opposing papers in the Section 158(1)(c) application. Applicant having reasonable prospects of success in the review application. Good cause accordingly shown for rescission of order.

JACKSON, AJ

Introduction

- [1] The Respondent alleged that he had been unfairly dismissed by the Applicant on 27 August 2014 and referred a dispute to the CCMA.
- [2] The Applicant raised a preliminary point at the arbitration proceedings alleging that the Respondent was not an employee but rather an independent contractor.

- [3] The CCMA commissioner ultimately found that the Respondent was an employee of the Applicant and that he had been unfairly dismissed.
- [4] The commissioner, in her award dated 1 December 2014, ordered the Applicant to retrospectively reinstate the Respondent together with back-pay.
- [5] The Applicant timeously launched an application to this Court on 7 January 2015 to review and set aside the commissioner's award.
- [6] Respondent filed his opposing affidavit on 21 May 2015 after Applicant had filed its supplementary affidavit in terms of Rule 7A(8) on 8 May 2015.
- [7] On 15 December 2014, Applicant wrote a letter to the Respondent's attorneys advising of the impending review application and advised that Respondent would not be paid or reinstated as ordered in the award and further that Applicant would resist any attempt to enforce the award.
- [8] Notwithstanding the above, the Respondent delivered a notice in terms of section 158(1)(c) of the Labour Relations Act ("LRA") to make the arbitration award an order of Court on 15 January 2015 (that is 8 calendar days after receipt of the review application).
- [9] Case number J37/15 was allocated to the section 158(1)(c) application whilst the case number for the review application was JR2743/14.
- [10] What happened next might well have led to Mosime, AJ granting the section 158(1)(c) application in chambers unopposed on 26 February 2015.
- [11] In both its notice of intention to oppose the section 158(1)(c) application as well as its answering affidavit, Applicant's attorneys numbered the case as JR37/15 instead of J37/15.

The merits of the rescission application

- [12] Another error of Applicant's attorneys was to describe the application for rescission as one brought in terms of section 145 of the LRA whereas the rescission application was clearly contemplated to be one in terms of section 165 of the Act.

- [13] Section 165(1)(a) of the LRA provides as follows:

'The Labour Court acting on its own accord or on the application of any affected party may vary or rescind the decision, judgment or order –

- (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order.'

- [14] In the case of BDO Spencer Stuart (JHB) Inc v Otto,[1] Sutherland, AJ (as he then was) dealt with the similarity of the above rule to Rule 42(1) of the High Court Rules as well as Erasmus'

commentary on same where it was stated:

‘In that commentary is the articulation of the notion that where a fact which would have precluded the granting of the order or a fact which would have induced a Judge not to grant the order exists, and that fact was unknown to the Judge at the time of the granting of the order, any order is ‘erroneously’ granted. This approach has been endorsed in the Labour Court. (See *Enzo Panelbeaters CC v CCMA and Others* (1999) 20 ILJ 2620 (LC) and *Sherwood Strategic Advertising CC v Scott* (2001) 22 ILJ 2046 (LC)).’

[15] That is clearly what seems to pertain to this particular case.

[16] Had Mosime, AJ been aware of the Applicant’s filed opposition to the Respondent’s section 165(1)(c) application, she would not have dealt with the matter unopposed in chambers.

[17] Clearly then, the order was granted erroneously in the absence of the Applicant.

[18] The question which then arises is whether such finding is sufficient to grant an order rescinding the judgment, i.e. without the Applicant having to demonstrate good cause.

[19] I am in agreement with the view of Tip, AJ in *Kolobe v Proxenos* (Sophia’s Restaurant)[2] that particular considerations arising in the context of an order made by default pursuant to an application in terms of Section 158(1)(c) of the Act, and that “good cause” indeed must be shown by an applicant in these circumstances.

[20] Good cause no doubt involves a consideration of the Applicant’s prospects of success in both the Section 158(1)(c) application as well as the review application.

[21] It appears to me that the Applicant has reasonable prospects of success in these applications.

[22] The allegation that the commissioner was confused as to the onus of proof and the duty to commence leading evidence regarding the issue of whether the Respondent was an employee or an independent contractor is one that carries some prospects of success.

[23] Insofar as the control and dominant impression tests are concerned, it appears that the commissioner might not have considered much of the extensive evidence which Applicant led on this point at the arbitration hearing.

[24] In the circumstances, I am prepared to accept that the Applicant has some prospects of success on review.

[25] Another determination of good cause mentioned in the *Kolobe* case (*supra*) involves a consideration of the conduct of the party seeking relief.

[26] Other than what appeared to be typographical and/or administrative errors on the part of Applicant’s attorneys, it would appear to me that Applicant has abided by all the necessary time periods in terms of the Rules of Court and has evidenced a bona fide intention to prosecute its review application timeously as well as to oppose the section 158(1)(c) application timeously too.

[27] Accordingly, I am of the view that Applicant has indeed shown good cause.

[28] I do not believe that this is a case which warrants an order of costs being granted against the Respondent.

Order

[29] In the premises, the following order is made:

- (i) The order made by Mosime, AJ under case number J37/15 on 24 February 2015 is hereby rescinded;
- (ii) There is no order as to costs.

Jackson, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Attorney L Cirone

For the Respondent: Respondent in person

[1] (2002) 23 ILJ 1374 (LC) at para 12.

[2] [2000] 11 BLLR 1291 (LC).

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Prepared on 12 October 2026 · Esheria