REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case No: 636/2012

Reportable

In the matter between:

SUN INTERNATIONAL (PTY) LTD t/a

THE TABLE BAY **Applicant**

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

DANIEL DU PLESSIS *NO* **Second Respondent**

MOEGAMAT ADIEL MARTIN **Third Respondent**

Delivered: 12 December 2013

Summary: Application for leave to appeal by party who had not opposed review application not competent. Applicant for leave to appeal ordered to pay costs.

RULING ON COSTS IN APPLICATION FOR LEAVE TO APPEAL

STEENKAMP J

Introduction

[1] The third Respondent ("Martin") applied for leave to appeal in respect of my default judgment dated 11 October 2013. The preliminary question is whether he can do so, given that he chose not to oppose the applicant's application for review.

[2] I ordered that the arbitration award handed down by the Commissioner (the second respondent) dated 14 July 2012 is reviewed and set aside. I substituted it with an order that Martin's dismissal was fair.

[3] The proceedings before this Court on 11 October 2013 were unopposed, Martin having elected through the offices of his current attorney, Isak Murison, to file a notice of withdrawal of opposition on 23 May 2013.

The right to seek leave to appeal

[4] It appeared to me that Martin has no right to seek leave to appeal in these circumstances. He chose not to oppose these proceedings at the relevant time, when the application for review was argued. He cannot now elect to do so and ask the Court for leave to go to the Labour Appeal Court when it turns out that his choice not to oppose the matter in Labour Court has had adverse consequences for him.

[5] The Supreme Court of Appeal (SCA) per Nugent JA in dealing with a similar application has held:

> 'What also strikes one as odd is that submissions on behalf of Mr Pitelli should be made in this Court, when they could have been made to the court below before it made its orders, but were deliberately withheld. This is not a court of first instance. It seems to me that it would be most unfortunate for a court of first instance to find its orders reversed only because the litigant chose not to tell the court why the orders should not be made, and thought

> better to make these submissions to a court of appeal only after that had occurred.'[1]

Appealability of the default judgement

[6] It also seemed to me that the default judgment of the Court *a quo* is not appealable – it is not final in effect in that the default judgment of the Court *a quo* is theoretically capable of being revisited in the form of an application for rescission of judgment.

[7] According to section 166(1) of the LRA, only final judgments and final orders are appealable:

> 'Any party to any proceedings before the Labour Court may apply to the Labour Court for leave to appeal to the Labour Appeal Court against any final judgment or final order of the Labour Court.'

[8] In the words of Nugent JA in *Pitelli*:

> 'An order is not final, for the purposes of an appeal, merely because it takes effect unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable (perhaps there might be cases in which it is appealable but for the moment I cannot think of one). It is not appealable because such an order is capable of being rescinded by the court that granted it and it is thus not final in its effect...
>
> .... An order made by default is by its nature not final in effect because it is capable of being revisited, albeit that condonation might be required for the delay...'[2] [Emphasis added]

[9] The fact that Martin is unlikely to succeed with any application for rescission is beside the point. This question too was considered by Nugent JA:

> 'I am mindful of the considerable hurdle that would need to be overcome by a litigant who seeks to have an order rescinded when he or she deliberately

[1] *Pitelli v Everton Gardens Projects CC* [2010] 4 All SA 357 (SCA) at para 24.
[2] Ibid at paras 27 and 31.

> allowed it to be taken by default, bearing in mind that in order to succeed the litigant will need to provide a "reasonable and convincing explanation" for the default. But the appealability of the order is dependent upon whether it is capable of being revisited and not upon whether such an application will succeed. And if a litigant deliberately chooses to permit an order to go by default then he or she can hardly complain if a court refuses to allow the matter to be re-opened. A litigant cannot expect to blow hot and cold depending on what is most advantageous at the time.'[3]

Non – compliance with Rules 30(1) and 30(2)

[10] In any event, the application did not comply with Rules 30(1) and 30(2) of the Rules of this Court in that it failed to set out the "grounds of appeal".

[11] In terms of Rule 30(1) an application for leave to appeal to the Labour Appeal Court may be made, "by way of a statement of the grounds for leave, at the time of the judgment or order."

[12] In terms of Rule 30(2), "if leave to appeal has not been made at the time of judgment or order, an application for leave must be made and the grounds for appeal furnished within 15 days of the date of the judgment or order against which leave to appeal is sought".

[13] For purposes of Rules 30(1) and 30(2) the grounds of appeal must be clearly and succinctly set out in clear and unambiguous language so as to enable the Court and the respondent to be fully informed of the case the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal.[4]

[14] Table Bay pointed out that it does not know what case it is required to meet because:

14.1 the notice of application for leave to appeal at paragraphs 1, 2, 3 and 4 relies on speculative errors committed by the Court a quo.

That these errors are speculative is demonstrated by:

[3] Ibid at para 34.
[4] *Songolo v Minister of Law and Order* 1996 (4) SA 384 (E) at 385I-J..

14.1.1 Firstly, the recurrent phrase which governs all of these grounds – 'it is respectfully submitted that this Honourable Court, erred in finding, **to the extent that it did**, that the second respondent had...' (emphasis added); and

14.2.2 Secondly, the fact that the notice of application for leave to appeal relies on findings which were not made by the court. Thus, the court 'erred in finding that the second respondent had committed misconduct...'

14.2.3 Thirdly, the fact that the actual findings of the Court are nowhere challenged in the notice of application for leave to appeal.

14.2 Martin's heads of argument in respect of his application for leave to appeal nowhere attack any finding made by the Court but, instead, address grounds of review raised by The Table Bay in its application to review the arbitration award.

[15] In all the circumstances, this application was incompetent and should have been struck from the roll. However, I asked the parties to file additional submissions on the appealabilty of the judgment.

Costs

[16] After the Court had requested further submissions on the appealability of the judgment, Martin's attorney submitted a "note" on 3 December 2013 and conceded that the default judgment is not appealable. He withdrew the application for leave to appeal but he did not tender costs. I issued a further directive on 4 December 2013 calling on the parties to file submissions on the question of costs in the abandoned application by no later than 9 December 2013.

[17] Table Bay, in its submissions dated 22 November 2013, specifically indicated that it would seek an order that Martin pay the costs of this application. persisted with that submission.

[18] Martin, having withdrawn the appeal without a tender for costs, appears to have presumed that each party would pay its own costs. If that is the case, he seeks to flout a well established common law principle in respect of costs in the context of a withdrawal of a claim, i.e. the party who withdraws a claim should pay its costs.

[19] In terms of section 162 of the Labour Relations Act,[5] the Labour Court may make an order for the payment of costs according to the requirements of the law and fairness.[6] When deciding whether to make an order for the payment of costs, the Labour Court may take into account the conduct of the parties in proceeding with or defending the matter.[7]

[20] Subject to the discretion of the Court as to an order for the payment of costs, very sound reasons must exist why a respondent should not be entitled to its costs. The applicant who withdraws his or her action is in the same position as an unsuccessful litigant because, after all, his claim or application is futile and the respondent is entitled to all costs associated with the withdrawing of applicant's institution of proceedings.[8]

[21] The Court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such an order as to costs as would be fair in the discretion of the Court.[9] Considerations such as *mala fides*, unreasonableness and frivolousness of the party's actions would justify the imposition of costs.[10]

[5] Act 66 of 1995 ("the LRA").
[6] Section 162 (1).
[7] Section 162(2)(b)(i).
[8] *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) at 300D-E; *Waste Products Utilisation (Pty) Ltd v Wilkes and Another (Biccari Interested Party)* 2003 (2) SA 590 (W) at 597A; *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others intervening*) 2003 (3) SA 547 (C) at 550C-D.
[9] *Rudman v Maquassi Hills Local Municipality and* Others (J1472/13) [2013] ZALCJHB 166 (30 July 2013); (2013) JOL 30644 (LC) at para 35, quoting *Mcpherson v Teuwen and Another* (2009/27002) [2012] GPJHC 18 (22 February 2012).
[10] *Davidson v Emvest Assest Management (Pty) Ltd* (JS306/2012) [2013] ZALCJHB 255 (28 May 2013), [2013] JOL 30940 (LC) at para 52.

[22] I turn to consider the reasonableness of Martin's conduct who was advised by his attorney:

22.1 In circumstances where a claim has been withdrawn, the question to ask in relation to costs has been whether the party who withdraws a claim in litigation was entitled to institute that claim in the first place.[11]

22.2 Martin was not entitled to institute the present application, as he now concedes.

22.3 This was not a matter where the respondent in the review application was unaware of the review. Martin was at all times represented by attorneys (first by Parker Attorneys and then by his current attorney of record, Isak Murison) and he was fully aware that Table Bay sought an order to review and set aside the arbitration award in his favour, the effect of which would be to set aside the relief of re-instatement and back pay awarded by the Commissioner.

22.4 Armed with this knowledge, it was unreasonable for Martin to have taken a wait-and-see approach to the litigation, only to attempt to resurrect it in an ill-conceived application for leave to appeal. Martin's election to withdraw his opposition to Table Bay's review application resulted in the abandoning of his right to oppose the review application.

22.5 Martin's subsequent application for leave to appeal resulted in the abuse of the court process. That conduct was unreasonable.

[23] Table Bay submitted that it had to incur further unnecessary legal costs to oppose the application for leave to appeal. I agree. The costs in this application could have been avoided if Martin acted reasonably.

Order

[24] The third respondent, Martin, is ordered to pay the costs of the applicant (The Table Bay) in the application for leave to appeal.

[11] See *Erasmus v Grunow en 'n Ander* 1980 (2) SA 793 (O) 798D-H; cf. also *Chen v Association of Arbitrators of SA and Others* 2003 (4) SA 96 (D) 98I- 99B.

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Steenkamp J

APPEARANCES:

For the Applicant:	Peter Buirski
Instructed by:	Salijee Du Plessis Van der Merwe Inc.
For the Third Respondent:	Isak Murison (Attorney).